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No. 04-624

In The
Supreme Court of the United States

DUWAYNE D. HAMMOND, JR.; COLEEN GRANT; LARRY WATSON; SEVERINA SAM HAWS, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF THE IDAHO STATE TAX COMMISSION,
Petitioners,

v.

COEUR D'ALENE TRIBE OF IDAHO, NEZ PERCE TRIBE; SHOSHONE-BANNOCK TRIBES,
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 5

THE NINTH CIRCUIT IN OVERRIDING IDAHO'S FUEL TAX SCHEME MISCONSTRUED ITS ROLE IN INTERPRETING STATE LAW THEREBY SERIOUSLY THREATENING STATE TAX SOVEREIGNTY 5

A. The Ninth Circuit Disregarded Idaho's Tax Policy 6

B. The Application of an Unambiguous State Tax Law Does Not Raise a Federal Question 10

CONCLUSION 15

TABLE OF AUTHORITIES Page

Cases:

Arizona Dep't of Revenue v. Blaze Const. Co.,
526 U.S. 32 (1999).....4, 5, 14

Cotton Petroleum Corp. v. New Mexico,
490 U.S. 163 (1989)..... 2

County of Yakima v. Confederated Tribes and Bands of Yakima Nation,
502 U.S. 251 (1992)..... 3

Dyer v. Sims, 341 U.S. 22 (1951)..... 13

First Agricultural National Bank v. State Tax Comm'n, 392 U.S. 339 (1968)..... 11

Goodman Oil Co. v. Idaho State Tax Comm'n,
28 P.3d 996 (Idaho 2001)..... 6

Kern-Limerick v. Scurlock,
347 U.S. 110 (1954)..... 11, 12

McClanahan v. Arizona Tax Comm'n,
411U.S. 164 (1973)..... 3, 13

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973).....3, 4, 14

Oklahoma Tax Comm'n v. Chickasaw Nation,
515 U.S. 450 (1995)..... 2, 8, 9, 10, 11, 12, 14

Richards v. Prairie Band Potawatomi Nation,
S.Ct. No. 04-361 ..... 2, 4, 5

Richfield Oil Corp. v. State Board of Equalization,
329 U.S. 69 (1946)..... 12

S.R.A. Inc. v. Minnesota, 327 U.S. 558 (1946) .. 13

Standard Oil Co. v. Johnson, 316 U.S. 481 (1942) 13

United States v. Allegany Co., 322 U.S. 174 (1944) 12

United States Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 1

United States v. New Mexico, 455 U.S. 729 (1982) 4, 10, 12

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 3, 4, 14

Statutes and Legislative Material:

2002 Idaho Sess. Laws ch. 174..... 6

§ 63-2402(1), Idaho Code..... 7

§ 63-2403(4), Idaho Code..... 5

§ 63-2405, Idaho Code 7

§ 63-2406(4), Idaho Code..... 7

HAYDEN CARTWRIGHT ACT 5

MULTISTATE TAX COMPACT, RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001) 1

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members, eighteen States are associate members and three States are project members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The underlying purpose of the Commission is to preserve to States the sovereignty to fashion their own tax systems. The court of appeals decision be-

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[1] No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its member States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member State. Finally, this brief is filed pursuant to the consent of the parties.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin. Project members are Iowa, Nebraska and Rhode Island.

low used the prism of federal law to distort the plain meaning of the clearly-articulated, carefully-drawn Idaho statute placing the legal incidence of its fuels tax on the receipt of gasoline by distributors. This rejection of Idaho's considered tax policy decision directly conflicts with this Court's teaching in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), and constitutes a dramatic and unwelcome incursion into state tax sovereignty.

In a brief *amicus curiae* filed last month in the companion case of *Richards v. Prairie Band Potawatomi Nation*, No. 04-631, the Commission urged the Court to grant certiorari to preserve important areas of certainty in state taxation impacting Indians, a certainty that bolsters state-tribal harmony.

The territorial aspects of the three concentric sovereigns—tribal, state and federal—have informed this Court's current jurisprudence. The most difficult circumstance arises when all three sovereigns are involved, when a State seeks to tax a non-Indian for a transaction with an Indian on the reservation. The non-Indian taxpayer is within the State and under state authority. The transaction is with an Indian on tribal land, therefore invoking tribal sovereignty. Federal sovereignty extends over both territories.[3] With sensitivity to all three sovereigns, the Court developed a nuanced but malleable and uncertain balancing-of-interests test to determine whether States may impose tax in these cases. The analysis calls for a "particularized inquiry into the

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[3] See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188 (1989) ("There are, therefore, three different governmental entities, each of which has taxing jurisdiction over all of the non-Indian [on-reservation] wells.")

nature of the state, federal, and tribal interests at stake . . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

In two other circumstances, however, where either state or tribal sovereignty predominates, the Court has adopted a "more categorical approach." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 258 (1992). Companion cases in 1973 confirmed two bright-line tests as beacons of certainty in this difficult area. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) concerned off-reservation activity beyond the boundary of tribal sovereignty, where state interests prevail. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-149. The companion case of *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973), concerned a State's effort to tax Indian property or activity on the reservations, where tribal sovereignty interests are paramount.

> [A]sent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

Mescalero, 411 U.S. at 148. These bright-line rules have eased administration and reduced litigation.

The courts of appeals in *Richards* and the instant case ignored these clear standards. In both case the States had carefully drafted statutes imposing tax on the receipt of gasoline by the distributor. This means the tax is imposed high on the distribution chain where the taxpayers are fewest and the compliance burden easiest. It also generally means the tax is imposed on an off-reservation activity, invoking the bright-line rule of *Mescalero* and thereby furthering certainty.

In *Richards*, the Tenth Circuit did not question that tax was imposed on the distributor's receipt off reservation, but erroneously refused to apply the bright-line rule mandated by *Mescalero*. It used instead the result-compliant balancing-of-interests test from *White Mountain Apache Tribe*.

Here, the Ninth Circuit sidestepped both more certain rules. First it completely ignoring the plain language of the Idaho statutory scheme and the expressed intent of the Idaho Legislature imposing the Idaho fuels tax on the non-Indian distributor. Following that legislative design should have triggered the bright-line rules of *Mescalero* and *Arizona Dep't of Revenue v. Blaze Const. Co.*, 526 U.S. 32 (1999).[4]

[4] In *Blaze*, Arizona taxed a federal contractor's receipts from building roads for the federal government on an Indian reservation. Because neither party to the transaction was a tribal member, the Court rejected use of the balancing test of *White Mountain Apache Tribe*. It applied instead the more concrete "'narrow approach' to the scope of governmental tax immunity" adopted in *United States v. New Mexico*, 455 U.S. 720, 737 (1982), permitting taxation of the federal contractor unless Congress "take[s] responsibility for the decision, by so *expressly* providing." 526 U.S. at 36.

The Ninth Circuit then compounded its error by failing to heed explicit congressional authorization in the Hayden-Cartwright Act for States to impose gas tax on licensed traders on reservations, so persuasively argued by Idaho in its Petition for Certiorari.

In both cases, the courts of appeals ignored state law, thereby violating the sovereignty of States to craft their own tax systems and choose on whom to impose tax. By shifting where the States had placed the legal incidence of the tax, these decisions have undermined the certainty of this Court's "more categorical approach" in this sensitive area of law. Granting certiorari will once again afford the Court companion cases with which to restore definition to these bright-line rules and provide States and tribes with the certainty and predictability that fosters good relations between them.

ARGUMENT

THE NINTH CIRCUIT IN OVERRIDING IDAHO'S FUEL TAX SCHEME MISCONSTRUED ITS ROLE IN INTERPRETING STATE LAW THEREBY SERIOUSLY THREATENING STATE TAX SOVEREIGNTY.

Here, as to fuel later marketed to retailers of two of the tribes, the distributors received the gasoline off reservation as in *Richards*. With regard to the Coeur d'Alene Tribe, the distributor evidently imported gasoline from Washington directly onto the reservation in Idaho. Under the Idaho statute, the gasoline was received by the distributor when it crossed the border. Idaho Code §63-2403(4) (Michie Supp. 2004) (App. 70-71). Because the tax is imposed on the receipt by the distributor, not on a transaction with the tribe, the more certain rules allowing the State to tax absent Congress's "*expressly* providing" to the contrary would control.

A. The Ninth Circuit Disregarded Idaho's Tax Policy

In 2002 the Idaho Legislature amended its fuel tax expressly to place the legal incidence of the tax on gasoline distributors. The Ninth Circuit disregarded this Idaho tax policy under the guise of preserving to federal courts the authority to determine the legal "incidence of a state tax on a sovereign Indian nation." App. 11. While the Ninth Circuit's strained misinterpretation of the Idaho statute is worrisome, its misallocation of interpretative authority over state tax systems to federal law constitutes a serious contravention of state sovereignty and a pressing reason to grant Idaho's Petition for Certiorari.

Unquestionably, the 2002 Idaho Legislature amended its fuel tax to obtain a different result from the Idaho Supreme Court's decision in *Goodman Oil Co. v. Idaho State Tax Comm'n*, 28 P.3d 996 (Idaho 2001), *cert. denied*, 534 U.S. 1129 (2002) (fuel tax imposed on the retailer). The 2002 amendment explicitly set forth that purpose in an uncodified introductory section;[5] it imposed the tax on the receipt of fuel by the distributor;[6] it detailed the distribu-

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[5] Section 1 of 2002 Idaho Sess. Laws ch. 174 states:

> The Legislature intends by this act to modify the holding of the Idaho Supreme Court in the case of Goodman Oil Company of Lewiston, et al v. Idaho State Tax Commission, 136 Idaho 53, (June 8, 2001). Specifically, the Legislature intends, by this act, to expressly impose the legal incidence of motor fuels taxes upon the motor fuel distributor who receives (as "receipt" is defined in Section 63-2403, Idaho Code) the fuel.

[6] "A tax is hereby imposed upon the receipt of motor fuel in this state by any distributor receiving motor fuel

tor's responsibility for reporting and paying the tax;[7] and it placed legal liability on the distributor.[8] None of the provisions cited by the Ninth Circuit passes on the legal incidence of the tax or the tax liability or requires the distributor to collect tax from any other party.[9]

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upon which the tax imposed by this section has not previously been paid." § 63-2402(1), Idaho Code.

[7] "The excise tax imposed by section 63-2402, Idaho Code, is to be paid by the distributor, and measured by the total number of gallons of motor fuel received by him at the rate specified in section 63-2402, Idaho Code.. That tax, together with any penalty and/or interest due, shall be remitted with the monthly distributor's report required in section 63-2406, Idaho Code." § 63-2405, Idaho Code.

[8] "Any distributor required to pay the tax imposed by this chapter who fails to pay such tax shall be liable to the commission for the amount of tax not remitted plus any applicable penalty or interest. The commission may collect such amounts in the manner provided in section 63-2434, Idaho Code." § 63-2406(4), Idaho Code

[9] The Ninth Circuit cited four sections to conclude that the tax is not really imposed on the distributor: (1) a standard *bad debt deduction* (distributor should not have to pay tax when it is not paid for its gasoline); (2) a *security provision* (the portion of a distributor's receipts covering the amount of its tax liability is held "in trust" to give the State a secure position to recover taxes from an insolvent distributor); (3) an *anti-windfall provision* (a taxpayer who has passed on the economic burden of the tax must promise to pass on the economic benefit of a refund); and a *cost of compliance allowance* (to cover a business's costs to comply with its tax responsibilities). None of these provisions places liability for the tax or the obligation to report or pay it on anyone other than the distributor. They do consider the *economic burden* of passed-on tax and cost of compliance and make sensible administrative provision accordingly.

In sum, Idaho moved the legal incidence of the tax to the distributor in exactly the manner that this Court had instructed in *Chickasaw*. The Court there held that "[t]he initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax." 515 U.S. at 458. The Court recognized that integral to the legal incidence test is the ability of a State to specify where that legal incidence lies and even to move it to preserve state tax authority.

> And if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence

Id. at 460. The Court embraced the virtues of a bright-line, legal-incidence test—predictability, certainty and administrability—as preferred tax policy. It explained that "our focus on the tax's legal incidence accommodates the reality that tax administration requires predictability." *Id.* It cited with approbation the entreaty of 11 *amici* States with large Indian populations that a "legal incidence" test "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority." *Id.*

In spite of this Court's clear affirmation of the legal-incidence test in *Chickasaw* and Idaho's unambiguous placement of the legal incidence of the tax on the distributor in reliance on that rule, the Ninth Circuit repeatedly indicated that it found Idaho's tax policy decision unacceptable because it could end up imposing a burden on tribes.

> If the legislature could indirectly tax Indian nations merely by reciting *ipso facto* that the incidence of the tax was on another party, it would wholly undermine the Supreme Court's precedent that taxing Indians is impermissible absent clear *congressional* authorization. App. 12.
>
> We agree with the Tribes that if we determined legal incidence solely by looking at the legislature's stated intent, we would be permitting the state to name one party the taxpayer while requiring another to pay the tax, in the process avoiding tax immunities held by the second party. App 14.

"Permitting the state to name one party the taxpayer," however, is exactly what this Court held in *Chickasaw*. The key factor was not the Idaho Legislature's "merely reciting *ipso facto* that the incidence of the tax was on another party," but rather its *actually placing* the legal incidence on the distributor under the plain meaning of the statutory scheme.

The Ninth Circuit resisted acknowledging that States have that power for fear it would permit Idaho to "indirectly tax Indian nations" through the passing on of the economic burden of the tax

> If state legislatures could tax Indian tribes merely on the assertion that the incidence of the tax lies elsewhere, it would permit states indirectly to threaten the very existence of the Tribes. App. 14.

All this concern about "indirect" threats reveals that the Ninth Circuit was effectively disavowing the legal incidence test in favor of an economic burden test.

The legal-incidence standard, however, always entails the possibility that the economic burden will be passed on. In adopting that test, the Court fully anticipated that States would set state tax policy in such a way that the economic burden of a fuel tax could be imposed *indirectly* on tribal retailers and, ultimately, on their customers. The Court in *Chickasaw* had explicitly rejected Oklahoma's complaint "that the legal incidence of a tax 'has no relationship to economic realities.'" 515 U.S. at 459. It rejected an economic burdens test and pointed out the similar effect of its modern intergovernmental immunity doctrine under which States may impose a nondiscriminatory tax on federal contractors even though the entire economic burden of the tax is borne by the federal government. *Id.* at 460, n. 9. As this Court made amply clear in *United States v. New Mexico*, 455 U.S. 720 (1982), New Mexico's adoption of a *vendor* sales tax was controlling, permitting a tax that would have been barred had the State chosen a *vendee* sales tax.

B. The Application of an Unambiguous State Tax Law Does Not Raise a Federal Question.

The Ninth Circuit sought to avoid the result of Idaho's tax policy choice by claiming that interpretation of legal incidence was a federal question. By invoking federal law, it seemingly acknowledged *sub silentio* that following *state* law would place legal incidence where it did not want it. It sidestepped the "dispositive" issue of where Idaho had chosen to place the incidence of the fuel tax with this reconceptualization.

> Thus we conclude that, while the legislative declaration is "dispositive" as to what the

> legislature *intended*, removing the need to predict the legislative aim from reports and legislative statements, it cannot be viewed as entirely "dispositive" of the legal issue that the federal courts are charged with determining as to the incidence of the tax. App. 14 (emphasis in original).

It cited *Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954), for the proposition that "the question of incidence has been explicitly held by the United States Supreme Court to be one of federal law." App. 13. It sought support for this proposition by quoting from *Kern-Limerick* as follows:

> the Supreme Court rejected the idea that "a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign" because "[s]uch a conclusion . . . would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." App 13-14, quoting from *Kern-Limerick*, 347 U.S. at 121.

The Ninth Circuit misinterpreted the *Kern-Limerick* decision in several ways.

First, it failed to distinguish legislative action from court action. Of course a state *court* cannot "throw tax liability" where it chooses. *First Agricultural National Bank v. State Tax Comm'n*, 392 U.S. 339, 346-47 (1968). But the Idaho *legislature* can choose, as this Court held in *Chickasaw*, to "throw tax liability" on the distributor.

Second, the Ninth Circuit's concern about tax burden is misguided. States may arrange their tax system so as to impose tax on a party who may pass on the economic burden to a sovereign entity. This does not mean that the State has "arbitrarily eliminated an exempt sovereign." Allowing the economic burden to be borne by an exempt sovereign fully complies with federal law enunciated by this Court in *Chickasaw* and *United States v. New Mexico*.

Third, *Kern-Limerick* did not, in fact, hold that federal law governs legal incidence. A State legislature chooses where to place the legal incidence, as Alabama chose in *Kern-Limerick* to tax the purchaser. All *Kern Limerick* claimed was that federal law governed "facts and constructions upon which federal constitutional issues rest.[11]", 347 U.S. at 121 (footnote 11 discussed below). This refers to the facts of the case and the construction of the federal contract that determined who, in fact, the purchaser there was—the federal government not its agent. The cases cited in *Kern Limerick* in footnote 11 reinforce the conclusion that the federal questions are contractual terms and legal relationships; they do not stand for the proposition federal law may displace state authority to allocate legal incidence of a tax.[10]

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[10] In *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 83-4 (1946), the Court agreed that California's construction of its tax as "an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales" was binding. "But it is not determinative of the question whether the tax deprives a taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but its operation and effect."

In *United States v. Allegany Co.*, 322 U.S. 174, 183 (1944) the Court identified the federal issue:

Federal law also controls the "operation and effect" of the state law on constitutional protections. Thus, it determines here whether the State's imposition of tax on a particular party unlawfully impinges on federal or tribal sovereignty. With regard to state taxation affecting Indians as noted earlier, federal law has articulated three different tests covering three different circumstances. A state tax on a tribe or tribal member on the reservation will be struck down absent express permission from Congress. *McClanahan*. A state tax imposed on non-Indians for

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> The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.

In *Dyer v. Sims*, 341 U.S. 22, 29 (1951), federal law governed "the responsibility of this Court in reaching its own conclusions as to the contract, its obligations and impairment, for otherwise the constitutional guaranty could not properly be enforced."

In *S.R.A. Inc. v. Minnesota*, 327 U.S. 558, 564 (1946), the Court stated "[i]n determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court."

And finally, in *Standard Oil Co. v. Johnson*, 316 U.S. 481, 483 (1942), the Court made clear "the relationship between post exchanges [the entity taxed under California law] and the government of the United States [was] a relationship which is controlled by federal law."

In each of these cases, the federal question was not interpreting state law to determine on which party to a transaction the legal incidence of the state tax fell, but the identity of that party and its relationship to the federal government under a federal contract or statutory scheme.

transactions on reservations with Indians will be determined by federal law under the interest-balancing test of *White Mountain Apache Tribe*. But a tax imposed off-reservation on Indian or non-Indian alike will be upheld "[a]bsent express federal law to the contrary." *Mescalero*, 411 U.S. at 148-149. These are matters of settled federal law and control whether a State's tax placed on a particular party is valid.

But federal law does not control on which particular party the State has chosen to place the tax. *Chickasaw* preserves to States that choice and further holds that such legal incidence, not "economic realities," provides the factual predicate for applying this settled federal law. Whether the "operation and effect" of Idaho's imposing tax on the receipt of gasoline by distributors violates some constitutional protection is indeed a matter of federal law and is determined by the rules established by this Court in *Mescalero* and *Blaze*, not *McClanahan*.

The Ninth Circuit's refusal under the guise of following federal law to acknowledge and accept this state tax policy choice is a serious incursion on state tax sovereignty. Furthermore, the Ninth Circuit's failure to follow federal law laid down by this Court's explicit doctrinal choice in *Chickasaw* to give precedence to state-identified legal incidence over "economic realities" will lead to uncertainty and increased litigation. This infringement of state sovereignty and refusal to follow clear recent precedent of this Court provide classic and compelling reasons to grant certiorari.

CONCLUSION

For the reasons stated, your *amicus* respectfully requests the Court to grant the petition for certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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